

No. 77-1471

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In the Supreme Court of the United States

OCTOBER TERM, 1977

MICKEY EDWARDS, ET AL., *Petitioners*

v.

JIMMY CARTER, PRESIDENT OF THE UNITED STATES

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONERS

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The respondent's brief raises several issues to which petitioners have fully briefed in the District Court and Court of Appeals below. Although petitioners refer the Court to the record which has been transmitted to this Court and also to Judge MacKinnon's dissent, your petitioners desire to address briefly the major points raised by the respondent in his opposition.

JURISDICTION

A. Standing

The respondent has admitted that this case is now ripe but maintains that the District Court was correct in denying petitioners standing. The District Court based its argument in large part on the fact that in

its view too many contingencies remained before the injury would be felt. All those contingencies have now come to pass.

Petitioners further argue that the *objective* interest of the House of Representatives to vote has been impaired by the respondent's action. The respondent argues that there is "no judicially-enforceable right to be able to vote in the first place" (Respondent's Brief at 7). Petitioners strongly disagree with this assessment of judicial power. Respondent's hypothetical examples in support of this fallacious argument are not on point. A more analagous example is, would there be any injury to the House of Representatives if the Senate alone passed a bill and the President "signed" it into law. Surely this Court could strike the bill as having no effect since it did not follow the constitutionally prescribed processes of being approved by the House. Obviously the injury is to the legislators whose right to vote on that measure has been nullified in the same sense as that of Senator Kennedy in *Kennedy v. Sampson*, 511 F.2d 430 (C.A. D.C., 1974).^{*} Would the Court uphold the Senate-only approved law because the House could not convince them to send

^{*} Respondent's reliance on a law review Note (Respondent Brief at 8, n.6) is also misplaced. The Note did *not* preclude standing where Congress has not specifically authorized the suit. For example, in *Kennedy v. Sampson*, 511 F.2d 430 (C.A. D.C. 1974), the Note argued that although Senator Kennedy was the lone plaintiff and the suit was not authorized, that he could be viewed as a spokesman for the majority since his colleagues had voted for the measure in question. In this case, more than a majority of the Members of Congress have co-sponsored a resolution that they should be given an opportunity to vote on the transfer of property. In that sense, the sixty petitioners can also be viewed as spokesmen. However, petitioners maintain that the derivative injury suffered by them is sufficient to confer standing.

the measure over to the House before the President signed it?

The respondent is correct by stating that the petitioners were free to introduce legislation on this subject. That is not the issue. The point is that no matter what kind of legislation introduced or passed by the House, such legislation would not prevent the unlawful transfer of United States property to Panama until the House of Representatives has exercised its constitutional right to vote on the measure. Respondent's reference to the House's "power of the purse" is inapplicable here where the bare transfer of title to property does not require an appropriation.

B. Political Question

Judge MacKinnon addressed the issue of whether a political question is involved in this case and determined that it was not. (Pet. App. 25a). Judge MacKinnon stated that this "is the type of controversy that United States courts decide every day, and there is no lack of judicial and manageable standards for resolving it." (Pet. App. 26a).

In the first "political question" case to be decided by the Supreme Court, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), Chief Justice Marshall stated:

It is emphatically the province and the duty of the judicial department to say what the law is.

* * *

[T]he court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

* * *

The judicial power of the United States is extended to all cases arising under the Constitution.

1 Cranch (5 U.S.) at 177, 178.

The Supreme Court has held that it is the duty of the judicial branch to hold executive officials, including the President, within the ambit of their Constitutional powers. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); See *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

In this case only the President was named as defendant because only he has the constitutional authority to make treaties. Mr. Justice Frankfurter pointed out in his concurrence in *Youngstown*, *supra*:

“ * * * To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action. And so, with the utmost unwillingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the government, I cannot escape consideration of the legality of Executive Order No. 10340.”

(343 U.S. at 596).

This Court, and it alone, can prevent usurpation of the power of the House of Representatives by the President of the United States from being effected. The question presented is one of great constitutional importance which can and should be decided by this Court.

PETITIONERS HAVE PRESENTED A SUBSTANTIAL CASE CASE ON THE MERITS

Judge MacKinnon's dissenting opinion presents a substantial case for petitioners case on the merits and petitioners rely on it. (Pet. App. 26a-100a). Judge MacKinnon's opinion responds to all of the arguments raised by respondent.

The Indian Treaty cases are easily distinguished from this case since among other things Congress retains jurisdiction over Indian lands by the power of eminent domain. (Pet. App. 80a *et seq.*) Prior treaty practice demonstrates that the President has recognized that Congress has the exclusive power to dispose of property of the United States. (Pet. App. 91a *et seq.*) Constitutional history supports petitioners' contention that Congress' power in this area is exclusive. (Pet. App. 75a, *et seq.*) Other Congressional powers, cited by respondent, such as the power to regulate foreign trade, are clearly different, since Congress retains the power to change any Treaty which would effect foreign trade. Congressional power in this area is unique since United States property, once conveyed, can not be returned by an Act of Congress.

Even if the respondent is correct in his interpretation of the constitutional history of the treaty clause that the framers intended that the clause permit the President to cede "territory", Article 4, Sec. 3, cl. 2 speaks of "Territory or other Property belonging to the United States" (emphasis added). Even if the framers thought that the executive could cede our "fisheries" it is doubtful that they intended that a treaty could also cede United States ships nearby. In Panama, there is not only territory, but billions of

dollars worth of property in the form of railroads and other such items.

CONCLUSION

For these reasons, petitioners respectfully request that this Court grant their petition for writ of certiorari.

Respectfully submitted,

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